IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Writ Petition No.2l56 of l992

Jayant Vishnupant Gangakhedkar ..Petitioner
vs
The Hon'ble the Chief Justice
High Court Bombay and anr....Respondents

Mr Rajiv Patil for the petitioner
Mr.C.J.Sawant, Sr Counsel with Mr.R.M.Sawant
Government Pleader for respondent nos l and 2
Mr.P.L.Naik for respondent nos. 3 to 30.

CORAM: A.P.SHAH & S.J.VAZIFDAR JJ.

Dated 17.2.2005

Per A.P.Shah J.

. The petitioner joined the service as a Clerk / Section Writer in the High Court on its Appellate Side on 2.9.l972. Respondent nos.3 to 30 were also initially appointed as Clerk/Section Writer on the Appellate Side but prior to the appointment of the petitioner. The petitioner was promoted to the post of Asst Superintendent on l4.9.l98l. There is no dispute that respondent nos 3 to 30 were promoted to the post of Asst Superintendent prior to the petitioner. The petitioner passed higher standard departmental examination in the year l989. Respondent nos. 3 to 30 were promoted to the post of Superintendent during the period l985 to l989. It appears that none of these respondents except

respondent nos. 29 and 30 have passed the departmental examination. It is alleged by the petitioner that the said respondents were promoted on their giving undertaking in writing to the effect that they shall appear and pass higher standard departmental examination within three attempts. Respondent nos. 3 to 30, however, have not passed departmental examination till date. The petitioner therefore contends that he is entitled to be shown as senior to respondent nos 3 to 30. He is seeking a declaration that he is eligible and entitled to promotion to the post of Assistant Registrar with effect from l989 and Dy Registrar with effect from l998. We may mention that at the time of hearing the petitioner confined his claim only against respondent nos 3,7,8,ll and l4.

2. It is not disputed before us that as per the normal channel of promotion on the Appellate Side clerks are entitled to promotion to the post of Assistant Superintendent and Assistant Superintendent are entitled to promotion to the post of Superintendent. It may be seen that in exercise of powers conferred upon him under Article 229 of the Constitution of India, the Hon‘ble the

Chief Justice framed Rules on 30.8.l980 for regulating recruitment to the post of Inspectors, Assistant Superintendents and Superintendents, hereinafter referred to as "the l980 Rules". Perusal of Rule l(b) and (c) of l980 Rules would show that according to them normal rule for departmental promotion to the post of Asst Superintendent and Superintendent is seniority cum merit.It may be stated that passing of departmental examination was not laid down as a precondition in the aforesaid Rules for promotion to the above posts. However, subsequently by notification issued on 27.l.l98l again in exercise of powers conferred upon him under Art 229 of the Constitution, the Hon‘ble Chief Justice promulgated Rules regarding passing of lower and higher standard departmental examinations by the members of the staff of the High Court, which Rules hereinafter referred to as "the l98l Rules". These Rules came into force with effect from l.2.l98l as per the above notification dated 27.l.l98l. It is clear from the recitals in the main notification itself of the Rules framed on 27.l.l98l that the members of the staff of this court who have completed age of 45 years as on l.2.l989 are exempt from appearing and passing of departmental

examination prescribed under the aforesaid Rules for departmental promotion. Rule 2 of the said Rules which is material for our purpose reads as follows:

> "(2) "No Clerk shall be promoted to the post of Assistant Superintendent or other promotional post unless he/she passes the Lower Standard Departmental Examination;
>
> No Assistant Superintendent shall be promoted to the post of Superintendent unless he/she passes the Higher Standard Departmental Examination".

We may mention that by amendment dated 3l.8.l988 the Hon‘ble the Chief Justice was pleased to extend the exemption from passing the examination upon attaining the age of 45 years at any time after l.2.l98l.

3. It may be seen that in exercise of powers under Article 229 of the Constitution of India again in supersession of the existing Rules on the subject which included l980 Rules as well as l98l Rules, the Hon‘ble Chief Justice has framed on l9.l0.l985

comprehensive Rules known as "Bombay High Court (Recruitment) Rules, l985, hereinafter referred to as "the new Rules". As per rule l(b) these Rules were to come into force on l5.l0.l985 however, by the orders issued from time to time coming into force of these new rules was postponed by the Hon'ble Chief Justice and these rules were not brought into force at all and are repealed under rule l6 of the Bombay High Court (Appellate Side) Rules, 2000 which have been brought into force on 7.ll.200l.

4. On behalf of the respondents it was submitted that respondents were promoted to the post of Superintendent in usual course on seniority cum fitness basis without any pre-condition of passing of higher standard departmental examination. It was denied that undertakings were taken from the respondents that they will have to pass higher standard departmental examination in three attempts. It was submitted that no departmental examination was held upto July l986 and the promotions of respondent nos. 3,7,8 and ll were effected in the year l985 as they were promoted as Superintendent prior to conducting of the departmental examinations. Similarly respondent

no. l4 was promoted in l987 without any pre-condition for passing examination. It was submitted that rule 2 of the Departmental Examination Rules requiring passing of the higher standard departmental examination was not made operative till the judgment of the Nagpur Bench in Writ Petition No.377 of l988 was delivered on l9.4.l988.It was also submitted that the enforcement of l985 Rules was required to be postponed from time to time and ultimately indefinitely. In view of the possibility of bringing the said Rules in force, all promotions were made only on adhoc basis and not due to the fact that the respondents had not passed the higher standard departmental examination. In fact the petitioner’s own promotion was made on adhoc basis so as to avoid further complications in the matter of adjusting seniority in the common cadre, if were to come, as contemplated under l985 Rules. It is submitted that the petitioner is claiming benefit of promotional post from retrospective effect from l989 without doing the work of Addl. Registrar and without having gone through the process of selection such as consideration of Confidential Report, Special Report and other merits and oral interview.

5. After hearing Mr.Rajiv Patil for the petitioner and Mr.C.J.Sawant for the respondents and after going through the entire relevant record we are satisfied that respondent nos. 3,7,8,ll and l4 were promoted to the post of Superintendent in usual course on the seniority cum fitness basis on substantive post without any precondition of passing higher standard departmental examination, as the promotions were governed by the then existing Rules which provided criteria for promotion as seniority cum merit. It appears that the Rules of l98l regarding passing of higher standard departmental examination were not made operative and no departmental examination was conducted till the judgment of Nagpur Bench in l988. Promotion in question were made as per the rule of seniority cum fitness in accordance with the rule of l980. It appears that this very issue was raised before the Nagpur Bench in Writ Petition No. 377 of l988 in Bhaskar s/o Marutrao Devgade and ors vs High Court of Judicature at Bombay and ors. The petitioners in that petition contended that they had passed the higher standard departmental examination and they claimed promotion on that basis. The main question before the Bench

was whether the l98l Rules had become operative or not and the Bench answered this question in the affirmative. The Bench, however, categorically refused prayer of the petitioners therein to reopen the promotion made prior to the date of judgment. In other words promotions which were made prior to judgment of the Division Bench remained unaffected. Paragraph l8 of the judgment which is material for our purpose reads as follows:

> "l8. In the result, the instant writ petition is partly allowed. It is declared that in the absence of the New Rules having come into force, the promotions to the post of Assistant Superintendent and the Superintendent on the appellate side shall be governed by the existing rules viz. the Rules framed on 30.8.l980 and the Rules framed on 27.l.l98l in filling up the existing or the future vacancies in these posts until the New Rules i.e. the rules dated l9.l0.l985 as framed or as may be modified or the entire set of New Rules framed by the Hon'ble Chief Justice in exercise of his powers under Article 229 of the Constitution of India are brought into

force. It is directed that the petitioner no l should be considered for promotion to the post of Superintendent and petitioner 2 and 3 should be considered for promotion to the post of Assistant Superintendent if and when the existing or the future vacancies in these posts are filled in, till of course the New Rules as stated above are brought into force. Rule made absolute in the above terms. No costs".

6. It may be seen that in the present case promotions were made prior to the Division Bench delivered judgement and the only criteria for the promotion was seniority cum fitness. It is not disputed before us that respondent nos 3,7,8,ll, and l4 are senior to the petitioner. Merely because petitioner has passed higher standard departmental examination he cannot claim seniority over the respondent nos 3 to 30 as passing of the examination is a matter of acquisition of eligibility for promotion to higher post and not that passing of examination confers any right to promotion as sought to be contended by the petitioner. Under the circumstances prayer of the petitioner to grant him promotion with

retrospective effect cannot be accepted. Petition is accordingly dismissed.